

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

DARREN W. PREUSSLER,

Claimant,

v.

DAVE WATKINS, dba  
CALLIDAVE ENTERPRISES, INC., dba  
SPECIALTY FLOOR CARE,

Employer,  
Defendant.

**IC 04-001199**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

Filed Feb. 16, 2006

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston, Idaho, on July 27, 2005. Anthony C. Anegon represented Claimant. Terrance R. Harris represented Defendants. The parties submitted briefs and the case is now ready for decision.

**ISSUES**

After due notice to the parties, the issues were identified as:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether and to what extent Claimant is entitled to the following benefits:
  - (a) temporary disability;
  - (b) permanent partial impairment (PPI);
  - (c) permanent disability in excess of impairment (PPD);
  - (d) medical care;
  - (e) attorney fees; and

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1**

4. Whether Employer is liable to Claimant for penalties set forth in Idaho Code § 72-210 for failing to insure liability.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he injured his left thumb at work in the early morning hours of December 18, 2003. He was operating a mechanical floor scrubber for Employer at the Lewiston Rosauers grocery store when he caught his left thumb in hyperextension between the wall and the machine handle. He timely notified his supervisor when he reported for work the following night and sought medical care. He is entitled to all benefits, including 2% whole person permanent impairment and disability in excess of impairment. Employer unreasonably denied Claimant's claim. Employer had no Idaho workers' compensation coverage at the time of the accident and is subject to statutory penalties.

Defendants contend Claimant is not credible and did not suffer an accident or injury at work. Claimant made himself unavailable for light-duty work and should not be awarded TTD benefits. In its post-hearing brief, Employer alleges for the first time that only the corporation – not Dave Watkins personally – should be considered a party defendant.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Mr. Preussler, co-worker Duane "Will" Stricker, supervisor Teddy Liles, Mr. Watkins, and Rosauers assistant store manager Mike Peer;
2. Claimant's exhibits 1-13; and
3. Defendants' exhibits 1, 2, 5-14.

### **FINDINGS OF FACT**

Credibility of witnesses became a major issue in this matter. Thus, findings of fact about certain aspects of testimony or allegations are relevant.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2**

1. Employer performs janitorial service on contract for Rosauers grocery stores in Washington and Idaho. Mr. Watkins is the owner, president, and sole shareholder of Callidave Enterprises, Inc. Mr. Watkins worked in this industry in both Washington and Idaho before he incorporated Callidave Enterprises, Inc., in 2000. Mr. Watkins testified he believed he had workers' compensation coverage for his Idaho employees. He testified about two small medical-only claims in 2000 from which he believed the workers' compensation premiums were included in his state taxes. Despite first receiving, on the day after the accident, notice from Mr. Liles of Claimant's alleged work accident, Mr. Watkins did not complete a Form 1 or any notice of injury.

2. Claimant worked as a janitor for Employer between three and six weeks before the alleged accident. He worked only at the Lewiston, Idaho, store on a graveyard shift. The Lewiston Rosauers is open 24 hours per day.

3. About two weeks before the alleged accident date, Mr. Watkins walked Claimant through the store to point out cleaning deficiencies. Rosauers had complained. Rosauers had also specifically complained about the uncleanness of the lobby floors on the two mornings immediately prior to the alleged accident.

4. Claimant was supervised by Teddy Liles. Mr. Liles worked for Employer as a supervisor of janitorial crews at three Rosauers stores – in Colfax, Washington, and Moscow and Lewiston, Idaho. Unless he had to work as a fill-in for an absent employee, he generally visited each store each night.

5. Mr. Watkins relied upon Mr. Liles for nearly all communication with Claimant. Mr. Watkins repeatedly informed Mr. Liles about Rosauers' dissatisfaction over cleaning.

6. Employees began their shifts by telephoning Mr. Liles from the store telephone.

They ended their shifts the same way. Additionally, Employees claiming wages for work at the Lewiston store recorded their hours in writing at the store. This record has been altered in a way that makes it ambiguous whether Claimant last worked on December 18 or 19 and whether he reported briefly on December 19 or 20 before seeking medical attention. This ambiguity may be merely an artifact caused by different graveyard shift employees recording the date (before midnight) when they arrived versus the date (the next morning) when they left. Regardless, the initial medical record demonstrates Claimant first sought medical attention shortly after 1:00 a.m. on December 19, 2003. Thus, the alleged accident would have occurred during the early morning hours of December 18, 2003. Moreover, Mr. Watkins testified that the written record only pertained to hours billable to the Lewiston Rosauers – that is, if Mr. Liles was merely managing he was not expected to record his hours in writing on that sheet. That sheet does not indicate Mr. Liles' presence at the Lewiston store on December 18 or 19, 2003.

7. Claimant testified that on December 18, 2003, in the hour of 5:00 a.m., he injured his left thumb. He testified he was backing the mechanical floor scrubber in the lobby near the pay phones when he banged or pinned his thumb between the scrubber and the wall. He testified Mr. Liles was not present at the time and had left about 4:30 a.m. Claimant testified he did not think the injury important enough to report when he telephoned Mr. Liles to clock out. He testified he clocked out about 6:00 a.m. and reached Mr. Liles' answering machine. Claimant testified his thumb hurt worse by that evening when he reported again to work. He testified he did nothing while off work that day that injured his thumb or exacerbated his thumb injury.

8. Mr. Watkins testified he telephoned Mr. Liles about 2:00 or 3:00 a.m. the morning of the alleged accident. He testified he told Mr. Liles to hurry and finish cleaning the Colfax store and go check on the Lewiston store.

9. Mr. Liles testified he arrived at the Lewiston store between 4:00 and 6:00 a.m. He testified that Claimant followed him around the store when Mr. Liles first arrived to check its condition. He testified that he personally sat and watched Claimant for two hours that morning while Claimant operated the scrubber on the half of the lobby near the pay phones and applied the first two coats of wax. He testified Claimant finished using the scrubber before he, Mr. Liles, left sometime after 6:00 a.m. Mr. Liles testified Claimant did not have an accident or injure his thumb while using the scrubber. Mr. Liles testified that he personally spoke with both Claimant and Mr. Stricker by telephone when they clocked out that morning.

10. Claimant testified that Mr. Liles arrived about 2:00 a.m. and left about 4:00 or 4:30 a.m. Mr. Liles did not mention the quality of Claimant's work.

11. Mr. Stricker was Claimant's only co-worker that night. He testified that he did not observe the accident. He testified he was outside smoking a cigarette with Mr. Liles. He testified that when they finished, probably in the early part of the 4:00 a.m. hour, he returned to the store and Mr. Liles left without reentering the store. He testified that when he reentered the store, Claimant was holding his hand and that Claimant told Mr. Stricker that he had hurt it against a shelf inside the store using the scrubber. Mr. Stricker testified that he volunteered to finish using the scrubber on the lobby. In deposition, Claimant testified that Mr. Stricker told Claimant he had seen the alleged accident.

12. Rosauers assistant store manager Mike Peer arrived at the store shortly after 7:00 a.m. that morning. He saw Claimant waxing the lobby with a mop. They discussed the store's condition that morning. Claimant stated he would let the first wax coat dry before applying a second coat. Mr. Peer thought it too late in the morning to begin a second coat. They spoke again when Claimant clocked out. They discussed the need to improve the look of the

floors for an upcoming grand opening. Mr. Peer estimated a half hour had passed between the two conversations. The written record shows Claimant clocked out at 8:30 a.m. Mr. Peer testified he did not notice, and Claimant did not report to him, an injury to Claimant's hand.

13. Near the beginning of his shift the next evening, Claimant reported the alleged event to Mr. Liles while Mr. Liles was at the store. Mr. Liles observed Claimant's thumb was cold and swollen and advised him to seek medical attention. Mr. Liles testified that Claimant and Mr. Stricker clocked in by telephone about 10:00 p.m. that evening and that he arrived just before midnight. The written record shows Claimant and Mr. Stricker clocked in at 11:50 p.m. Claimant testified that Mr. Liles was present when he arrived and that he immediately reported his injury to Mr. Liles.

14. At St. Joseph Regional Medical Center on December 19, 2003, Claimant described the alleged accident consistently with his hearing testimony. His thumb was cold and swollen. X-rays were negative. He was sent home with pain medication and a splint. Dr. Hocum treated Claimant there and provided a release from work for four days. Claimant made a copy and gave it to Mr. Liles that same night.

15. Claimant testified that when he returned with the work release, Mr. Liles stated he had no one-handed work available and sent Claimant home. Mr. Liles testified that when Claimant returned with the work release, Claimant pressured him to "remember" that he had been present and witnessed the accident. Claimant denied such a discussion occurred.

16. Mr. Liles testified that he believed Claimant had no intention to return to work for Employer, based upon this and subsequent conversations with Claimant. Mr. Liles testified that one night in late December 2003, he telephoned Claimant and asked him to work that night. He testified that Claimant agreed, but later called back and said he would not work that night.

17. Mr. Watkins testified that a couple of days after the reported accident, he personally contacted Claimant. He testified he told Claimant he did not believe Claimant suffered an accident and threatened to fire Claimant for not doing his job properly.

18. Beginning December 22, 2003, Claimant received treatment from Vicki Lott, M.D., and physical therapy. The medical records demonstrate Claimant repeatedly requested additional time off work, to which Dr. Lott acquiesced. Also, Claimant reported inconsistently to doctors about whether he suffered from drug allergies as he requested specific pain medications.

19. Claimant testified that about one week after the alleged accident, having received more treatment, he gave a release to light-duty work to Mr. Liles.

20. Mr. Watkins testified Mr. Stricker said he had seen the accident. Mr. Watkins testified he told Mr. Stricker, "That's not what I heard."

21. Mr. Stricker testified that in January 2004, Mr. Liles informed Mr. Stricker that he could keep his job if he testified that Claimant did not injure himself at work. Mr. Stricker testified that he refused to so testify and was fired one week later on the pretext that he had scratched the floor. In deposition, Mr. Stricker testified that three weeks after his termination Mr. Liles telephoned and offered Mr. Stricker his job back in return for such testimony.

22. Mr. Liles testified inconsistently about what records he made, what records he kept, what records he discarded, and what records he gave to Mr. Watkins.

23. Claimant testified he gave a copy of every doctor's note (at least 4) to Mr. Liles. Mr. Liles testified he gave a copy of every doctor's note (at least 4) to Mr. Watkins. Mr. Liles also testified he never saw Claimant again after Claimant gave him the second doctor's note. Mr. Watkins testified he received only two such doctor's notes.

24. Mr. Watkins testified he still keeps Claimant's name on the payroll as an active employee although Claimant has not worked since the alleged accident. He testified he has not attempted to contact Claimant to return to work although he has hired new employees since Claimant last worked.

25. Mr. Stricker testified he suffered from Fabry's disease, a condition which affects his memory.

26. Claimant's medical condition did not improve. On March 17, 2004, Claimant visited orthopedic surgeon Steven R. Boyea, M.D., on referral from Dr. Lott. He examined Claimant and diagnosed de Quervain's tenosynovitis and suspected an additional ligamentous injury as well. After more conservative treatment, on May 27, 2004, Dr. Boyea tried a steroid injection.

27. Claimant obtained another job in May 2004. He earns more money as a security guard than he did as a janitor.

28. An MRI taken August 10, 2004, was entirely negative for ligamentous or other injury. No X-ray or other radiological finding has demonstrated any objective, continuing problem in Claimant's left thumb and wrist.

29. Dr. Boyea performed surgery on August 30, 2004. He performed a first dorsal compartment release to relieve what he confirmed postoperatively to be "left de Quervain's tenosynovitis."

30. On February 4, 2005, Robert Colburn, M.D., performed an evaluation at Claimant's request. Despite finding Claimant "hypersensitiv[e]" and displaying an invalid grip strength, he diagnosed "1) hyperextension sprain injury, left thumb, related to the injury event of 12/18/03" and "2) De Quervain's Tenosynovitis, left, secondary to and related to #1." He also

diagnosed chronic left wrist pain without attributing causation. Dr. Colburn opined Claimant suffered a 2% whole man impairment.

31. The medical records demonstrate Claimant suffers or has suffered from depression, headaches, stomach ulcers, and kidney stones, all of which are unrelated to the alleged accident.

32. In written discovery, Claimant identified four prior workers' compensation claims. Employer independently discovered nine such claims. Moreover in written discovery, Claimant denied a prior left thumb injury. Employer independently discovered a 1995 workers' compensation claim of injury to the left thumb which included time loss.

### **DISCUSSION**

33. **Credibility.** The foundation for the findings of credibility is taken from the recommendations of the Referee, and not from the independent judgment of the undersigned Commissioners. Except for Mr. Peer, who had no stake in the matter and whose testimony was entirely credible, no other witness provided credible testimony. The discrepancies among the testimony offered by the various remaining witnesses cannot be reconciled as mere differences of perspective or minor instances of faulty memory. Mr. Liles was not credible in his answers under oath. His testimony was inherently improbable in places, internally inconsistent with itself in others, and often directly at odds with the testimony of Claimant and Mr. Stricker.

34. Mr. Watkins' testimony was not far behind. Although more polished in vocabulary and demeanor, Mr. Watkins offered inherently improbable testimony to justify his failure to obtain workers' compensation insurance. Indeed, Defendant's Exhibit 1 shows he withheld amounts for "L&I" deductions from his Washington State employees but did not do so from his Idaho employees. Nevertheless, he persisted in his allegation that he believed workers'

compensation premiums were somehow included in his taxes without any accounting for premiums or paperwork about alleged prior accidents. Moreover, he offered testimony calculated to support, or smooth the imperfections in, Mr. Liles' preposterous account of events.

35. Mr. Stricker was a friend of Claimant's for years before they began working together and was helped by Claimant to get the job with Defendant. Moreover, Mr. Stricker believes he was fired for refusing to testify against Claimant in this matter. Motive for bias aside and giving Mr. Stricker the benefit of the doubt, he testified that his medical condition makes his testimony unreliable.

36. Claimant's demeanor and pausing at hearing was not attributable to mere nervousness but rather exhibited untruthfulness. Claimant relied on the phrase "not to my knowledge" when trying to avoid giving what he perceived to be unfavorable testimony. Claimant's medical records pertaining to this injury show a predilection for using this minor problem as an excuse for not returning to work. His lack of attention to factual detail in deposition and in written discovery further undercuts the weight his testimony might have carried. Claimant's testimony demonstrates he tolerates only a casual acquaintance with the truth. In briefing, Claimant's counsel well points out that Claimant's multiple prior claims, including suspected workers' compensation fraud, do not by themselves logically show Claimant is lacking in veracity. Resort to innuendo and hearsay of suspicions of others is unnecessary. Claimant was not credible.

37. None of the foregoing credibility analyses should in any way be applied to the attorneys who tried this case. Both acted with competence and professionalism.

38. **Accident, Injury, and Causation.** Claimant bears the initial burden of demonstrating a prima facie case. *See, Seamans v. Maaco Auto Painting, 128 Idaho 747, 918*

P.2d 1192 (1996). Here, Claimant demonstrated a cold and swollen thumb. This is the most salient, objective, trustworthy fact of record.

39. Mr. Peer's failure to observe Claimant's injury on the morning of December 18, 2003, is not evidence that the injury was not present. Claimant himself did not consider the injury significant until several hours later when the swelling set in. It is consistent with the observation of Mr. Stricker that Claimant was holding his hand then finished his shift.

40. The initial history taken at the hospital is consistent with a compensable accident. Acknowledging that the history relies upon Claimant's description of the accident, it is the first written description of the event and, therefore, carries greater weight than the memories of interested witnesses over one and one-half years later.

41. Mr. Liles' attempt to eliminate the possibility that the accident occurred at work was patently insufficient. Absent direct evidence or believable testimony that Claimant injured his thumb elsewhere, the description of the accident provided in the first medical report shows it likely that Claimant suffered a compensable accident on December 18, 2003.

42. **Medical care.** Employer is required to provide reasonable medical treatment for a reasonable time. Idaho Code § 72-432. Defendant made no attempt at any time to obtain an independent medical examination to provide expert opinion to counter the possibly excessive treatment for a seemingly minor injury. The medical treatment provided was reasonable. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). Dr. Colburn opined the de Quervain's tenosynovitis was causally related to the claimed accident. That expert opinion is unchallenged. Claimant is entitled to benefits for all medical care related to his left thumb. The medical bills of record reflect the

relevant charges.

43. **TTDs.** The medical records show Claimant was released from all duty for four days immediately after the accident and to light duty only thereafter. There is no credible showing that Claimant was offered light duty by Employer at any time. The factual question of whether Claimant would have accepted it if offered does not arise. *See, Maleug v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). Employer does not dispute the TTD calculations suggested by Claimant.

44. **PPI and Disability.** Permanent impairment and permanent disability are terms defined by statute. Idaho Code § 72-420 – 425, 430. Dr. Colburn's expert opinion that Claimant suffered a 2% PPI as a result of the accident is reasonable and un rebutted.

45. Claimant failed to establish any permanent disability beyond impairment. He returned to a full-time position in May 2004. He earns more at the new job than at the old. He failed to show a loss of access to the labor market. None of the nonmedical factors for evaluation of disability set forth in Idaho Code § 72-430 apply. Claimant's permanent disability does not exceed impairment.

46. **§ 210 Penalties.** Employer was uninsured. As required by Idaho Workers' Compensation Law, the penalties of costs and attorney fees set forth at Idaho Code § 72-210 are appropriate as is the 10% penalty. Pursuant to IDAPA 17.02.08.033.01.e.ii, attorney fees of 30% is deemed reasonable.

### **CONCLUSIONS OF LAW**

1. Claimant suffered a compensable accident causing injury.
2. Claimant is entitled to benefits for TTDs in the amount of \$2,399.85.
3. Claimant is entitled to benefits for all medical care related to Claimant's left

thumb and wrist provided to the date of hearing.

4. Claimant is entitled to PPI rated at 2% of the whole man.

5. Claimant failed to show he suffered permanent disability in excess of impairment.

6. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-210.

Pursuant to IDAPA 17.02.08.033.01.e.ii, attorney fees of 30% of all benefits awarded herein are deemed reasonable.

7. Claimant is entitled to his costs and a penalty of an additional 10% of compensation awarded Claimant under Idaho Code § 72-210.

\* \* \* \* \*

### **ORDER**

1. Claimant suffered a compensable accident causing injury.

2. Claimant is entitled to benefits for TTDs in the amount of \$2,399.85.

3. Claimant is entitled to benefits for all medical care related to Claimant's left thumb and wrist provided to the date of hearing.

4. Claimant is entitled to PPI rated at 2% of the whole man.

5. Claimant failed to show he suffered permanent disability in excess of impairment.

6. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-210.

Pursuant to IDAPA 17.02.08.033.01.e.ii, attorney fees of 30% of all benefits awarded herein are deemed reasonable.

7. Claimant is entitled to his costs and a penalty of an additional 10% of compensation awarded Claimant under Idaho Code § 72-210.

8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 13**

DATED this \_\_\_16th\_\_\_ day of \_\_\_February\_\_\_\_\_, 2006.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
\_Participated but did not sign \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

\_\_\_\_\_  
\_/\_s/\_\_\_\_\_  
James F. Kile, Commissioner

\_\_\_\_\_  
\_/\_s/\_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

\_\_\_\_\_  
\_/\_s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_16\_ day of \_\_\_February\_\_\_\_, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

Anthony C. Anegon  
P.O. Drawer 698  
Lewiston, ID 83501-0698

Terrance R. Harris  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336

\_\_\_\_\_  
\_/\_s/\_\_\_\_\_